



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 50 OF 2017**

**MWW (A minor suing through the father and next friend**

**PWW).....APPELLANT**

**VERSUS**

**PETER KABATA alias KABATA MWANGI.....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising out of the judgment of Honourable Ekhubi B. M. Senior Resident Magistrate Othaya in PMCC No.22 of 2016; the appellant herein sued the respondent for damages arising out of an accident that occurred on 21<sup>st</sup> June, 2015 involving motor vehicles registration numbers KAU 703E belonging to the respondent and motor vehicle registration number KBJ 559F.

2. A brief summary of the case is as follows; the appellant's Plaintiff, indicates that the accident occurred on 21<sup>st</sup> June, 2016 along Nyeri-Othaya Road; the Appellant together with her parents were passengers aboard motor vehicle registration number KAU 703E when it collided with motor vehicle registration number KBJ 559F; the appellant blamed the driver of motor vehicle registration number KAU 703E for the accident.

3. At the trial in the lower court, the appellants father and next friend gave evidence that he had boarded motor vehicle registration number KAU 703E on the date of the accident together with the appellant and his wife; that they were involved in an accident with motor vehicle registration number KBJ 559F; he too blamed the accident on the respondent's driver for failing to swerve in an effort to avoid the accident; in re-examination, **PW1** stated that the respondent's driver was driving on the left side of the road; that he saw the oncoming motor vehicle registration number KBJ 559F driving towards them in a zigzag manner; he testified that the respondent's driver got off the road and parked the motor vehicle but the oncoming motor vehicle came and hit the matatu; he reiterated that that the respondent's driver had an opportunity to avoid the accident, but he did not.

4. **PW2**, the appellant's mother, corroborated **PW1**'s evidence; she confirmed that motor vehicle registration number KBJ 559F was coming towards them in a zigzag manner; she testified that the respondent's driver did not give way and instead stopped the matatu on the road; that the respondent's driver could have avoided the accident by moving off the road; she confirmed that the collision occurred on the left side of the road; she also stated that the respondent's driver had brought his motor vehicle to a stop when the oncoming vehicle came and collided into the one they were travelling in

5. The respondent called one witness **DW1** CP Mwana Hemisi Sheuri a Police Officer from Nyeri Traffic Base; she testified that the driver of motor vehicle registration number KBJ 559F was blamed for the accident as he left his lawful lane and came into the lane of the matatu thereby causing the collision; under cross-examination, she confirmed that the accident occurred on the matatu's lane; **DW1** testified that no charges were preferred against the driver of KBJ 559F, as the driver was deceased; the record reflects that **DW1** brought the police file to Court and her testimony was based on the contents therein.

6. After the full hearing the trial Court found that the appellant had not proved her case on a balance of probabilities and proceeded to dismiss the suit.

7. The appellant being dissatisfied with the trial Court's decision filed this appeal and sought to have it set aside; the appellant listed six (6) grounds of appeal in her Memorandum of Appeal dated the 20<sup>th</sup> December, 2017 which are as summarized hereunder;

(i) The learned Magistrate erred in fact and law in failing to consider the evidence tendered by the eye witnesses on the occurrence of the accident thus arriving at an erroneous decision to dismiss the suit;

(ii) The learned Magistrate misdirected himself by fully relying on the evidence of the Police Officer who was not the Investigating Officer and who did not witness the occurrence of the accident and therefore arriving at an erroneous decision;

- (iii) The learned Magistrate erred both in law and fact for considering irrelevant matters and against the weight of the evidence on record in arriving at the said decision in dismissing the suit;
- (iv) The learned Magistrate erred in fact and law in failing to consider or even adequately adopt and appreciate the written submissions of the appellant on record and the authorities annexed therein in support of the appellant's case;
- (v) The Learned Magistrate erred in fact and in law by failing to follow rules of precedents in awarding damages;
- (vi) That the Learned Magistrate misdirected himself in law and in fact by failing to be bound by the decision of the apex Court when faced with similar facts, contrary to the doctrine of stare decisis.

### **ISSUES FOR DETERMINATION**

8. The parties agreed to dispose of the Appeal by filing and exchanging written submissions; upon reading the parties rival written submissions this court has framed the following issues for determination;

- (i) Liability
- (ii) Quantum

### **ANALYSIS**

9. In considering the appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; it held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, the Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law.

10. The Court of Appeal also held that:

***“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”*** (See also **LAW JA, KNELLER & HANNOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403**).

### **LIABILITY**

11. This is the first issue for determination; from the evidence on record and the parties' rival submissions on the issue, it is not disputed that a collision occurred between motor vehicles registration number KAU 703E and KBJ 559F; the question that begs an answer is who was to blame for the collision.

12. The eye witness accounts of **PW1** and **PW2** both confirm that the accident occurred on the matatu's lawful lane; they both confirm that they saw motor vehicle KBJ 559F coming towards them in a zigzag manner and colliding with the matatu; **PW1** and **PW2** both testified that the matatu was knocked after it had come to a stop, the point of departure is that **PW1** states it stopped slightly off the road, while **PW2** states it stopped on the road; their evidence with regard to the point of collision being on the matatu's lane was not controverted by **DW1**.

13. After reading the rival submissions filed by the learned Advocates in this matter this court notes that the appellant's submissions indicate that **DW1** testified to the effect that the accident occurred in the middle of the road and further that there was somewhere for the driver of the matatu to go; upon perusal of the court record the proceedings this court finds that no such evidence was adduced by **DW1**;

14. The evidence on record indicates that the point of impact was on the left side of the road – the lawful lane of the respondent's driver; as indicated earlier, **PW2's** evidence corroborated that of **PW1** and the evidence of **DW1** did not controvert their evidence and also established that the confirmed the manner in which the accident occurred;

15. In the circumstances, was the respondent's driver to blame for failing to avoid the accident? This court finds no good reason to interfere with the findings of the trial magistrate in its finding that the appellant did not show on a balance of probability that the respondent's driver could have reasonably attempted to avoid the collision; the appellant's evidence was that the said driver came to a complete stop be it on or off the road when he saw the approaching zigzagging motor vehicle; this action was probably so as to allow the oncoming motor vehicle to passby; unfortunately, the said motor vehicle collided with the stationary matatu.

16. In the circumstances this court is satisfied that the respondent's driver exercised reasonable care and skill by bringing his motor vehicle to a halt; and the party to blame for the accident was the driver of motor vehicle registration number KBJ 559F as was correctly found by the trial magistrate.

17. The appellant did not discharge their burden of proof on a balance of probabilities; and this court is satisfied that the appellant has not proved that the respondent acted negligently thereby causing the accident.

18. This ground of appeal is found lacking in merit and is hereby disallowed;

**QUANTUM:**

19. Despite having disallowed the appeal on liability this court is duty bound to address and make a finding on the issue of quantum that may have been awarded had the appellant been successful;

20. As a result of the accident, the appellant suffered a fracture of the mid-shaft left femur and other soft tissue injuries; a Medical Report was prepared by Dr. F.W. Muleshe, the appellant's doctor; the appellant fully recovered from the injuries.

21. The appellants in their submissions in the trial Court had prayed for damages in the sum of Kshs.1,000,000/= while the respondent had prayed for Kshs.300,000/=; the learned Magistrate in his judgment indicated he would have awarded the plaintiff the sum of Kshs.550,000/= in damages.

22. This court finds that since the appellant had fully recovered from her injuries with no disability then an award of Kshs.400,000/= would have been adequate recompense.

**FINDINGS AND DETERMINATION**

23. The appeal is found lacking in merit and is hereby dismissed; the judgment of the trial court is hereby affirmed;

24. The respondent shall have costs of the appeal.

It is so Ordered.

**Dated, Signed and Delivered at Nyeri this 7<sup>th</sup> day of November, 2019.**

**HON.A.MSHILA**

**JUDGE**